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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1022

AUGUST BERGENTHAL,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT

Constitutionality of the Statute

As support for his contention that a substantial conflict exists between the law of Michigan and Wisconsin on the issues here involved, requiring resolution by this Court, petitioner cites *People v. Dickerson,* 164 Mich. 148, 129 N. W. 199 (1910).

Other jurisdictions have declined to follow this peculiar Michigan anomaly, preferring to follow Wisconsin's *Jessner v. State,* 202 Wis. 184, 231 N. W. 634 (1930). See *People v. Strong,* 114 Cal. App. 522, 300 P. 84 (1931); *Hunt v. State,* 248 Ala. 217, 27 So. 2d 186 (1946); *McVeigh v. State,* (Fla. 1954) 73 So. 2d 694, and *Parkin v. State,* (Fla. 1969) 222 So. 2d 457.

Professor Wigmore found the *Dickerson* decision to be noteworthy, but only for its backwardness. Of the Michigan court's treatment of a local statute providing for testimony by court appointed experts, Wigmore said:

> "It is a pity that the Court suffered such a severe attack of dikastophobia on the sight of this harmless statute. As the history and authorities of the present subject are ignored in the opinion, no further notice of its contents is needed; and it would certainly not be followed by the same Court today."

In the sixty years since *Dickerson* was decided, only one jurisdiction has seen fit to follow its irrationale: Illinois, in *People v. Scott,* 326 Ill. 327, 157 N. E. 247 (1927). That decision, holding improper the employment of court-appointed psychiatrists, ". . . finds this sensible practice repulsive; and shows entire ignorance of the movement to reform the defects of practice by employing this sensible method." (Wigmore, Evidence, 3d ed., Vol. II, p. 651) Illinois has apparently abandoned the position it adopted in *People v. Scott,* supra; see *People v. Dempsey,* 10 Ill. 2d 288, 139 N. E. 2d 780, 784 (1957).

The petition for certiorari shows no substantial conflict of law requiring resolution by this Court. The Michigan decision in *Dickerson* stands alone in its fetishistic adherence to one of the sorrier aspects of the adversary system; its

inflexible view of Michigan's constitutional "separation of powers" principle need not be incorporated into the Bill of Rights.

Application of the Statute

Petitioner also claims that the introduction of testimony by court-appointed psychiatrists, following the prosecution's failure to introduce testimony bearing on petitioner's sanity, was an unconstitutional application of Wisconsin's expert witness statute. Absent some conflict between the testimony of experts hired by the adversaries, petitioner argues, no issue was created warranting the introduction of such testimony.

This contention is adequately treated in the opinion of the Wisconsin Supreme Court (Appendix to Petition, pp. 684-686), summarized as follows:

1. The issue of petitioner's sanity was raised by his plea and the prosecution's denial;
2. This issue was *not* resolved by the introduction of testimony by defense experts, since the jury was not bound to credit defense testimony on the issue;
3. The prosecution had no duty to introduce expert testimony, and its failure to do so did not eliminate the issue of the defendant's sanity.
4. Since the issue of defendant's sanity remained for the jury as trier of fact, introduction of testimony by court-appointed experts was proper.

The decision below was clearly correct.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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